No. 09-756

Supreme Court, U.S.
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In The
Supreme Court of the United States

JEFFREY C. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, MARK BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, REBEKAH L. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS AND RENEE B. BOURGEOIS,

Petitioners,

VERSUS

BOOMTOWN, L.L.C. OF DELAWARE, PINNACLE ENTERTAINMENT, INC. OF DELAWARE, M/V BOOMTOWN BELLE II AND LOUISIANA 1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana, Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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I. QUESTION PRESENTED FOR REVIEW

The issue which applicants seek review is whether federal admiralty law or Louisiana law applies to a tort which allegedly occurred at the Boomtown Casino, a continuously moored floating casino.

The Louisiana Fifth Circuit Court of Appeal, relying on the U.S. Supreme Court decisions in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043 (1995) and *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118, 160 L.Ed.2d 932 (2005), ruled that the applicants had failed to establish "vessel" status to trigger application of general maritime law to this case.[1] This ruling is consistent with decisions of the U.S. Fifth Circuit Court of Appeals and Louisiana Federal District Courts which have consistently ruled that indefinitely moored floating casinos are not "vessels" for purposes of establishing federal admiralty jurisdiction.[2]

There are no legitimate writ grant considerations as set forth in Supreme Court Rule 10 which warrant the granting of a writ by this Court as is shown below.

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[1] See Louisiana Fifth Circuit Court of Appeal Judgment, Petitioners' App , at p. 5-7.

[2] See *Pavone v. Mississippi Riverboat Amusement Corporation, et al.*, 52 F.3d 560 (5th Cir. 1995), *Hertz v. Treasure Chest Casino, L.L.C.*, 274 F. Supp 2d 795 (E.D. La 2003), *Martin v. Boyd Gaming Corp* , 374 F.3d 375 (E.D. La. 2004) and *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006)

II. PARTIES TO PROCEEDINGS AND DISCLOSURE STATEMENT PER RULE 29.6

The caption to the case contains the names of all parties in the case. The ownership of the corporate parties is as follows:

1) Louisiana 1 Gaming, a Louisiana partnership in commendam, is owned as follows:

Boomtown, L.L.C. of Delaware (General Partner) – 5%

Boomtown, L.L.C. of Delaware (Limited Partner) – 90%

Pinnacle Entertainment, Inc. of Delaware (Limited Partner) – 5%

2) Boomtown, L.L.C. of Delaware is owned as follows:

Pinnacle Entertainment, Inc. of Delaware – 100%

3) Pinnacle Entertainment, Inc. of Delaware is owned as follows:

Publicly traded; no current owner of 10% or more.

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III. OPINIONS BELOW

Boomtown filed a Motion for Summary Judgment in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, asserting the lack of federal maritime/admiralty jurisdiction over this case. The motion was supported by affidavits establishing the undisputed facts concerning vessel status. Petitioners filed a Cross-Motion for Summary Judgment asserting that federal jurisdiction existed. The Trial Court granted summary judgment on petitioners' behalf and denied respondents' Summary Judgment Motion finding that petitioners' claims "are well founded under the admiralty and general maritime law of the United States . . . "[3]

Boomtown filed a writ application to the Louisiana Fifth Circuit Court of Appeal. The Fifth Circuit Court of Appeal granted the writ and reversed the Trial Court's Judgment in favor of petitioners and granted Boomtown's motion holding that maritime jurisdiction does not exist in this case because "as a matter of law, Boomtown is not a vessel in navigation."[4]

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[3] See Judgment of the Trial Court, Petitioners' App., at p 9-11.

[4] See Judgment of the Louisiana Fifth Circuit Court of Appeal, Petitioners' App., at p. 1-8.

Petitioners sought a writ from the Louisiana Supreme Court which was denied on September 25, 2009.[5]

Petitioners now seek a writ from this Court to review the ruling of the Louisiana Fifth Circuit Court of Appeal on the issue of vessel status.

IV. BASIS FOR JURISDICTION

Petitioners bring this petition for writ of certiorari pursuant to this Court's supervisory powers under 28 U.S.C. §1257.

V. STATUTES

The statutes involved in this matter, 28 U.S.C. §1257, La. R.S. 27:65(B)(1)(c) and 46 U.S.C. §30101, are set out verbatim in the petitioners' petition.

VI. STATEMENT OF THE CASE

On July 9, 2007 at approximately 9:15 p.m., Dale Bourgeois, a 56-year-old man, left the Boomtown Casino and thereafter drove his vehicle into a ditch adjacent to Peters Road striking a culvert. Due to injuries sustained in the collision, Mr. Bourgeois died within three to five minutes of the accident. An

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[5] See Writ Denial of the Louisiana Supreme Court, Petitioners' App., at p 12-13.

autopsy performed on Mr. Bourgeois determined that Mr. Bourgeois suffered a lacerated aorta, among other internal injuries, resulting in his death. A lab analysis routinely performed confirmed that Mr. Bourgeois had significant blood alcohol content at the time of his death. Also found in his blood was the cocaine metabolite, benzoylecgonine, indicative of recent cocaine ingestion and impairment.[6] The petitioners' allegations directed toward Boomtown are solely limited to allegations that employees of Boomtown served alcohol to Mr. Bourgeois contributing to his intoxication and ultimate death.

There are no allegations that the Boomtown Casino was being used as "a means of transportation on water" at the time of the accident. In fact, it is undisputed that the Boomtown Casino has not sailed and has been permanently moored since April, 2001 when Louisiana's gaming laws were changed prohibiting the sailing of casino vessels and authorizing only dockside gaming. Since 2001, the amended version of Louisiana Revised Statutes 27:65 requires that all river boat casinos located in Jefferson Parish

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[6] There is nothing in the record to support the petitioners' assertion that the decedent entered the Boomtown sober as asserted on p 16 of the Application for Supervisory Writ of Review. Rather, the coroner, Dr. Fraser MacKenzie, testified in his deposition, at p. 10, lines 13-20; p. 12, lines 15-25; p 13, lines 7-16 and p. 14, lines 1-5 that the decedent tested positive for narcotics, including cocaine

only conduct gaming "while it is docked and the licensee shall not conduct cruises or excursions."[7]

When this law took effect, the Boomtown Casino stopped gaming cruises, was permanently moored to land by dolphins welded to steel pilings and became a continuously moored dockside casino.[8] Utilities including water, telephone lines, sewer lines, cable television and data processing lines were all permanently attached to the vessel from land-based sources.[9] The entrance to the casino is fully enclosed and appears to be a part of the shore-side buildings to which the casino is attached.

When the law was changed to prohibit gaming cruises, Boomtown requested manning modifications be granted by the Coast Guard. In response, the Coast Guard allowed Boomtown to substitute a licensed mate with a deckhand "[b]ecause **the vessel will not be navigating on a waterway.**"[10] The Coast Guard recognized "that **the duties of deckhands have been diminished by *the removal of the vessel from navigation***" and allowed a reduction in the

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[7] La R.S. 27:65(B)(1)(c) as amended and added by Act 3 of the First Extraordinary Session of 2001.

[8] See Affidavit of Reynold Gaspard, Respondent's App , at p 1-2

[9] See Affidavit of Reynold Gaspard, Respondent's App., at p 1-2

[10] See U.S. Coast Guard letter dated May 17, 2001, Respondent's App , at p 4-5.

number of deckhands from eight to six.[11] Since that time, the Coast Guard Certificates of Inspection have mandated that the casino operate with a reduced crew and in a continuously moored status at the Boomtown Dock in Harvey, Louisiana.[12] The certificates specifically require that: **"[t]he conditions of operation and manning are based on the vessel being moored in the Harvey Canal."**[13] The certificate provides that: "[w]hile the vessel operates in a continuously moored status . . . the following manning requirements apply . . . "[14] Should the Boomtown "return to underway passenger service," the U.S. Coast Guard would have to be contacted and shown "compliance with all applicable regulations for the operation on the specific route intended and comply with standard manning requirements."[15]

Petitioners contacted the U.S. Coast Guard in January of 2009 and were informed that the Coast Guard did not know if the Boomtown Casino was capable of navigation on July 9, 2007, the date of the accident; however, the Coast Guard specifically stated that **the Boomtown Casino "was permanently**

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[11] *Id*

[12] See Certificate of Inspection, Petitioners' App., at p. 22-27

[13] See Certificate of Inspection, Petitioners' App., at p. 23.

[14] See Certificate of Inspection, Petitioners' App., at p 24.

[15] See U S Coast Guard letter dated May 17, 2001, Respondent's App., at p 4-5 and U.S Coast Guard letter dated January 14, 2009, Petitioners' App., at p. 31.

moored on July 9, 2007."[16] Unhappy with the response, petitioners requested a clarification of what the Coast Guard meant when it referred to the casino as "permanently moored."[17] The Coast Guard explained that: "[t]he M/V Boomtown Belle II was continuously moored in accordance with the Certificate of Inspection . . . "[18] The Coast Guard agreed with the petitioners that the casino theoretically "could navigate or set sail as needed with the proper preparations made."[19] Thus, it is clear that the U.S. Coast Guard does not agree with the petitioners' assertion that the Boomtown Casino is capable of navigation as it is.

While this matter was pending before the Louisiana Supreme Court, petitioners asserted, for the first time, their argument that the U.S. Coast Guard was considering a proposed regulation that would require that the Boomtown be removed from its slip if a storm entered the Gulf of Mexico; therefore, in theory, the Boomtown may have to be moved from its dock in the future. Petitioners' argument was based upon a letter that they obtained concerning the proposed

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[16] See U.S. Coast Guard letter dated January 7, 2009, Petitioners' App., at p. 33-34.

[17] See U.S Coast Guard letter dated January 14, 2009, Petitioners' App., at p. 31-32

[18] See U S. Coast Guard letter dated January 14, 2009, Petitioners' App., at p. 31.

[19] *Id.*

regulation.[20] Since that time, the U.S. Coast Guard has agreed to allow the Boomtown to remain in its slip during storms as long as it adds mooring lines, has a tugboat on standby and implements other procedures.[21] Thus, even the petitioners' theoretical reason for the Boomtown to sail in the future has been removed. Since 2001, there has been and is no plan to move the casino; rather, the intent is to continue to use it as a permanently moored floating casino.[22]

The Boomtown is and has been, since 2001, permanently moored and practically incapable of being used as a means of transportation on water. Any use as a means of transportation is purely theoretical. Thus, the Boomtown Casino is not a vessel so as to trigger the application of general maritime law.

VII. MEMORANDUM/ARGUMENT

Application of Maritime Law

a) For maritime law to apply, there must be a connection to maritime activity.

In order for general maritime/admiralty jurisdiction and law to apply to a tort allegedly committed

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[20] See U.S. Coast Guard letter dated July 13, 2009, Petitioners' App., at p. 16-18.

[21] See U.S. Coast Guard letter dated August 28, 2009, Respondent's App., at p. 3.

[22] See Affidavit of Reynold Gaspard, Respondent's App., at p. 1-2.

on a water craft, it is essential for the petitioners to establish that the tort claim has a sufficient connection with maritime activity.[23] In order to determine if there is a sufficient connection with maritime activity for admiralty jurisdiction to apply, the court must (1) assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce; and, (2) determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.[24] The key inquiry in the connection test is whether the allegedly tortious activity is "so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply to the suit at hand."[25]

Traditionally, torts occurring on a "vessel" in navigation are held to meet the connection test and maritime/admiralty jurisdiction applies. The issue then becomes whether the Boomtown Casino is, in fact, a "vessel" in navigation which would trigger admiralty jurisdiction at the time that the petitioners' alleged cause of action arose.

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[23] *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

[24] *Id.*

[25] *Id.*

b) The BOOMTOWN BELLE II is not a "vessel" in navigation.

In *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118, 160 L.Ed.2d 932 (2005), this Court granted certiorari in order to resolve confusion about how to determine whether a water craft is a "vessel" for purposes of establishing admiralty jurisdiction. In addressing whether a water craft is a "vessel," this Court reasoned that:

> A ship long lodged in a dry dock or shipyard can again be put to sea no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. **The question remains in all cases whether the water craft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one.**[26] [Emphasis added.]

As this Court made clear:

> Simply put, a water craft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.[27]

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[26] *Stewart v. Dutra Construction Co*, 543 U.S. 481, 496 (2005)

[27] *Id.*, at 494

This Court went on to point out that permanently or indefinitely moored water craft "as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again. See *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995) (floating casino was no longer a vessel where it 'was moored to the shore in a semi-permanent or indefinite manner'). . . ."[28] Pursuant to *Stewart*, the permanently moored Boomtown Casino's use as "a means of transportation on water" is not a practical possibility and is merely theoretical; therefore, the casino is not a "vessel" which would trigger the application of general maritime/admiralty law.

In rendering its decision, the Louisiana Fifth Circuit Court of Appeal correctly relied upon *Stewart* to reason that:

> [J]urisprudence holds that permanently or indefinitely moored watercraft "as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again." *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118, 160 L.Ed.2d 932 (2005). "A watercraft is 'not capable of being used' for marine transport in any meaningful sense if it has been permanently moored or otherwise rendered

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[28] *Id.*, at 494.

incapable of transportation or movement" *Id.*[29]

The Fifth Circuit went on to rule that the petitioners had not established "vessel" status to trigger the application of general maritime law.

There is no conflict between the Louisiana Fifth Circuit's decision and this Court as claimed by the petitioners. Rather, the decision of the Louisiana Fifth Circuit Court of Appeal in this matter is based upon the well reasoned application of the law.

c) Since the Boomtown Casino is not a "vessel," there is no connection to maritime activity.

In the *Stewart* decision, this Court specifically cited the case of *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995) as an example of a "floating casino" that was "no longer a vessel where it was moored to the shore in a semi-permanent or indefinite manner."[30] In the *Pavone* case, the U.S. Fifth Circuit Court of Appeal addressed the issue of whether an indefinitely moored floating casino was a vessel for purposes of establishing the application of general maritime law.[31] The Court

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[29] See Judgment of the Louisiana Fifth Circuit Court of Appeal, Petitioners' App., at p. 1-8.

[30] *Stewart*, at 494

[31] *Pavone*, at 568.

focused on whether the indefinitely moored casino, the BILOXI BELLE, had been "withdrawn from navigation" so as to no longer be considered a "vessel" in navigation for purposes of establishing maritime jurisdiction.[32] The Court ruled that the casino at issue "was removed from navigation" when it was indefinitely moored and was not a "vessel" for purposes of general maritime law.[33] It is interesting to note that the BILOXI BELLE casino had a contract "to tow the BILOXI BELLE to sheltered waters in the event potentially damaging weather is forecast . . . and was towed to sheltered waters on August 23, 1992, when Hurricane Andrew threatened."[34] Although there are some physical differences between the casino in *Pavone* and the Boomtown Casino, the finding that a casino which has been indefinitely moored loses its vessel status supports the ruling in this matter that the Boomtown was not a "vessel" for purposes of establishing admiralty jurisdiction.

In *Hertz v. Treasure Chest Casino, L.L.C.*, 274 F. Supp. 2d 795 (E.D. La. 2003), the captain of the TREASURE CHEST brought an action against the casino arising from injuries sustained while working at the casino. In attempting to determine plaintiff's legal remedy, the plaintiff argued that the TREASURE CHEST had a steel hull, raked bow, bilge pumps, ballast tanks, generator, self-propelled

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[32] *Id.*, at 568-569.

[33] *Id.*, at 570

[34] *Id.*, at 564.

engine, navigational aids, crew quarters, an operative pilot house, steering mechanism, life saving devices and a navigational crew and that it had made daily cruises since it began operating in 1994 until the law was changed in 2001.[35] The TREASURE CHEST's Coast Guard certificate required that the pilothouse be manned at all times that passengers were on board the casino.[36] The TREASURE CHEST was licensed as a passenger vessel and was required to have a master, able and ordinary seamen, a chief engineer and an oiler at all times.[37] The TREASURE CHEST conducted "man overboard" and fire drills periodically and fired up its engines.[38] The TREASURE CHEST had been moved two times since 2001 so that dredging of its berth could be done.[39] The Coast Guard's certificate of inspection was identical to the one issued prior to the change in the law in 2001 except that it designated that the boat be continuously moored.[40] Finally, the plaintiff argued that the TREASURE CHEST was connected to shore by cables which could be released fairly easily.[41] **The Boomtown Casino has been welded in place since 2001.**

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[35] *Hertz v Treasure Chest Casino, L.L.C.*, 274 F. Supp 2d 795, 797 (E.D. La. 2003).

[36] *Id*

[37] *Id.*

[38] *Id.*

[39] *Id.*, at 798

[40] *Id* , at 797

[41] *Id.*

The TREASURE CHEST's owners argued that the vessel was permanently moored and it had no intention of conducting any gambling cruises in the future.[42] The owners argued that the casino had only been moved two times since April 1,2001 for dredging purposes.[43] No gambling was conducted and no passengers were on board when the casino was moved for dredging.[44] The owners therefore contended that the TREASURE CHEST had been withdrawn from navigation and was no longer a "vessel" for purposes of establishing admiralty jurisdiction; therefore, general maritime law did not apply.

Judge Fallon of the U.S. District Court for the Eastern District of Louisiana found that the plaintiff's showing was insufficient to confer vessel status to the TREASURE CHEST.[45] The Court ruled "as a matter of law, that the TREASURE CHEST is not a vessel in navigation, and the plaintiff's claim is not within the admiralty jurisdiction."[46]

In the recent case of *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006), the Court was called upon to determine whether an indefinitely moored floating casino was a "vessel" for purposes of applying general maritime law. The plaintiff tripped

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[42] *Id.*, at 801.

[43] *Id.*, at 800.

[44] *Id.*

[45] *Id.*

[46] *Id.*, at 807

and fell while on the boat and was attempting to bring an action based upon unseaworthiness in admiralty.[47] The U.S. Fifth Circuit Court of Appeal noted that the crucial question regarding vessel status is "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one."[48] The Court found that the CROWN CASINO was indefinitely moored to the land by lines tied to steel pilings and, just as with the Boomtown Casino, that it received water, telephone lines, sewer lines, cable television and data processing lines attached to land-based sources.[49] Additionally, the casino had not been used as a seagoing vessel since March 28, 2001 when it was moored to its present location.[50] There was no plan to move the boat; rather, the intent was to use it as an indefinitely moored floating casino.[51] In upholding the Trial Court's granting of the defendant's motion for summary judgment, the U.S. Fifth Circuit Court of Appeal confirmed that "an indefinitely moored floating casino like the CROWN CASINO is not a 'vessel' for purposes of admiralty jurisdiction."[52]

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[47] *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 186 (5th Cir. 2006)

[48] *Id.*, at 187.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*, at 188

Here, as in *Pavone, Hertz* and *De La Rosa,* the facts and jurisprudence establish that a tort allegedly occurring on an indefinitely moored floating casino, such as the BOOMTOWN BELLE, is not sufficiently connected to maritime activity to trigger the application of general maritime jurisdiction or law.

d) The petitioners' reliance upon the cases cited in their memoranda is misplaced.

The petitioners have cited various cases from random venues in an attempt to support their position that the Boomtown Casino was a "vessel" at the time of the incident. The reliance on these cases is misplaced for the following reasons:

i) *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299, 1309 (11th Cir. 2008).

Petitioners cite the *Board of Commissioners* case in support of their position that the Boomtown Casino was a "vessel" at the time of the incident. However, the *Board of Commissioners* case concerned whether a maritime lien existed pursuant to a maritime contract.[53] The 11th Circuit acknowledged that "courts have historically tended to more narrowly construe

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[53] *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans,* 535 F.3d 1299, 1309 (11th Cir. 2008).

the definition of a vessel" in a maritime tort case than in a maritime lien case.[54] Thus, the 11th Circuit acknowledged in *Board of Commissioners* that they were applying a broader standard than the maritime tort standard in their decision.

Additionally, the M/V BELLE OF ORLEANS which was involved in the 11th Circuit case was not permanently moored when the damages accrued that were the subject of the maritime liens occurred. Rather, the M/V BELLE OF ORLEANS had broken loose from its moorings and had a collision with the piers, docks and other structures during Hurricane Katrina's landfall causing damages to itself and the marina.[55] The damages in the *Board of Commissioners* case were due to the fact that the water craft had broken loose and was not moored in its slip.[56] A case which sought damages caused by a loose water

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[54] *Id.*, at 1309.

[55] *Id.*, at 1302 and 1304.

[56] In *In re: Silver Slipper Casino Venture, L.L.C.*, 264 Fed.Appx 363, 366, 2008 WL 276072 (5th Cir. (Miss.)), 2008 A.M.C. 909, the U.S. Fifth Circuit Court of Appeal ruled that the Silver Slipper Casino was not a "vessel" for purposes of establishing admiralty jurisdiction despite being torn from its moorings during Hurricane Katrina. The Court rejected the argument that the casino was "definitely in navigation" when it struck a hotel and ruled that "the unfortunate fact that Hurricane Katrina blew the casino across the highway and into a hotel did not suddenly transform a non-vessel into a practically navigable watercraft." In the matter *sub judice*, the Boomtown Casino was, at all relevant times, permanently moored in its slip adjacent to the Harvey Canal and was never practically capable of navigation

craft is distinguished from the case now before the Court.

Finally, because the *Board of Commissioners* case involved a maritime lien rather than a tort, the 11th Circuit chose not to give any weight to the case of *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995) which this Court referenced in the *Stewart* case. In fact, the 11th Circuit made clear that it refused to follow *Pavone* despite the fact that this Court had referenced *Pavone* with approval in the *Stewart* case.[57] The 11th Circuit's decision in the *Board of Commissioners* case does not provide support for the petitioners' assertion that maritime law applies to this matter.

ii) *Young v. Players Lake Charles, L.L.C.*, 47 F. Supp. 832 (S.D. Tex. 1999).

Petitioners also cite the *Young* case in support of their position that maritime law applies in this case. The *Young* case arose prior to the change in the law in 2001, a time when Louisiana casinos were required to conduct gaming excursions. The court specifically noted that "the existence of admiralty jurisdiction over this action is not in dispute at this time."[58]

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[57] *Board of Commissioners of the Orleans Levee District*, at 1308.

[58] *See Young v. Players Lake Charles, L.L.C.*, 47 F. Supp. 832 (S.D. Tex. 1999), at 834

Again, the law now and at the time of the subject incident prohibited the Boomtown Casino from sailing.

iii) *Tagliere v. Harrah's Illinois Corporation*, 445 F.3d 1012 (7th Cir. 2006).

Petitioners cite the *Tagliere* case out of Illinois for the proposition that admiralty jurisdiction applies even if a river boat casino was indefinitely moored to a pier. A review of the *Tagliere* decision reveals that the 7th Circuit did not rule on whether admiralty jurisdiction existed; rather, the Court merely remanded the matter to the trial court to determine whether admiralty jurisdiction applied.[59] The *Tagliere* opinion raised various questions concerning when a casino is permanently moored and merely concluded that "[t]hese are matters for exploration on remand."[60]

There is a post-*Stewart* case from the U.S. Seventh Circuit that has ruled on the "vessel" status of an indefinitely moored casino. In *Earls v. Belterra Resorts, Indiana, L.L.C.*, 439 F. Supp. 2d 884 (S.D. Ind. 2006), admiralty jurisdiction was found not to exist concerning an accident on an indefinitely moored casino because it was determined not to be a "vessel."

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[59] *Tagliere*, at 1016.

[60] *Id.*, at 1016.

iv) *Holmes v. Atlantic Sounding Company, Inc.*, 437 F.3d 441 (5th Cir. 2006).

Petitioners cite the *Holmes* case in support of their position that the Boomtown Casino was a "vessel" at the time of the subject incident. The barge at issue in the *Holmes* case was "moved from place to place to house and feed employees during dredging projects at various locations."[61] The barge had been used to transport equipment from dredge site to dredge site fourteen times in approximately twenty months.[62] Unlike the Boomtown Casino which has been removed from navigation for over six years, the barge in the *Holmes* case was used as a means of transportation on water. Thus, the *Holmes* decision is factually different and does not provide support for the petitioners' arguments concerning an indefinitely moored floating casino.

v) *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137 (2002).

Petitioners cite the Iowa case of *Horak* as support for their position. A review of *Horak* reveals that the case involved the appeal of a jury's verdict in an action brought under the Iowa Dram Shop Act, Iowa Code Section 123.92 (1999).[63] *Horak* provides no

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[61] *Holmes*, at 443

[62] *Id.*, at 449

[63] *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 140 (2002)

guidance for this Court in making a determination of the issues in this case.

vi) *Quinn v. St. Charles Gaming Co.*, 815 So.2d 963 (La. App. 3d Cir. 2002).

Petitioners cite the *Quinn* case as support for their argument that maritime law applies. As in the *Young* case, the *Quinn* case arose prior to the change in the law in 2001, at a time when casinos were required to sail. The *Quinn* Court opined that "[b]oth of these gambling casinos are vessels on navigable waters, since, at the time of this incident, they were required by law to conduct gambling operations during excursions onto the Calcasieu River and Lake Charles."[64] Again, the law now and at the time of the incident which is the basis of this case arose prohibited the Boomtown Casino from sailing. *Quinn* is distinguishable from the matter before the Court.

e) The Admiralty Extension Act does not confer admiralty jurisdiction when there is no connection to maritime activity.

The petitioners also argue that this claim falls under the Admiralty Extension Act. The Admiralty Extension Act does not confer admiralty jurisdiction

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[64] *Quinn*, at 966.

when there is no connection to maritime activity; rather, the act is used to extend the "locality" requirement. In *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1134-36 (5th Cir. 1981) the Court held that the Admiralty Extension Act does not provide an independent basis for jurisdiction.[65] The *Sohyde* decision was based upon the legislative history of the act and this Court's decision in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972).[66] The Court opined that:

> In sum, we find that the Admiralty Extension Act was intended to eliminate the inequities, and anomalies, resulting from the strict application of the locality rule in admiralty under then existing law. **The Act was not intended to grant claimants new substantive rights of recovery nor relieve them from jurisdictional constraints unrelated to locality a la Executive Jet imposed on general maritime tort claimants.** Accordingly, we find claims under the Admiralty Extension Act to be subject to the "maritime relationship" rule of Executive Jet. [Emphasis added.][67]

Therefore, the Admiralty Extension Act does not relieve the petitioners from the requirement of

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[65] See also, *Grotwell v. Hockman-Lewis, Ltd.*, 734 F.2d 734 (11th Cir. 1984).

[66] *Sohyde*, at 1135-36.

[67] *Id.*, at 1136

proving a sufficient *connection with maritime activity* in order to establish admiralty jurisdiction. Even under the Admiralty Extension Act, petitioners must show that the incident has a potential disruptive impact on maritime commerce and that the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity. As is discussed above, there is no connection with maritime activity in this matter to confer admiralty/maritime jurisdiction in this case.

VIII. CONCLUSION AND PRAYER FOR RELIEF

This case is appropriate for summary judgment because there is no issue of material fact that Boomtown Casino is not a "vessel" for purposes of establishing admiralty jurisdiction. The Boomtown Casino has been removed from navigation and is practically incapable of being used as a means of transportation because it is welded into posts in a boat slip cut into the Harvey Canal and receives all major utilities from sources which are permanently attached from land to the vessel. Boomtown's Coast Guard Certificate of Inspection is based on Boomtown operating with a reduced crew and in a continuously moored status. The casino cannot legally conduct gaming cruises. There is no plan to ever use the Boomtown Casino as anything other than an indefinitely moored floating casino.

Since the Boomtown Casino is not a "vessel," any alleged tort occurring on the Boomtown Belle is not sufficiently connected to maritime activity to trigger admiralty jurisdiction or the application of general maritime law.

For these reasons, the Louisiana Fifth Circuit Court of Appeal was correct in its decision in this matter and that decision should not be disturbed.

Respectfully submitted,

GAUDRY, RANSON, HIGGINS
& GREMILLION, L.L.C.

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Attorneys for Respondents Boomtown, L.L.C. of Delaware, Pinnacle Entertainment, Inc. of Delaware, M/V BOOMTOWN BELLE II and Louisiana 1 Gaming, a Louisiana Partnership in Commendam

24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO.: 651-937 DIVISION C

JEFFREY C. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, MARK J. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF REBEKAH L. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS AND RENEE B. BOURGEOIS

VERSUS

BOOMTOWN, L.L.C. OF DELAWARE, PINNACLE ENTERTAINMENT, INC. OF DELAWARE, M/V BOOMTOWN BELLE, II AND LOUISIANA A-1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM

FILED: _____ /s/ _____
DEPUTY CLERK

AFFIDAVIT IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared:

Reynold Gaspard

A person of the full age of majority, domiciled in the Parish of Jefferson, State of Louisiana, who states that he has personal knowledge of the following:

1) He is currently employed by the Boomtown Casino in the position of Facilities Director working in this capacity since October 31, 2005.

2) That since April 1, 2001, Boomtown has not left its slip located off of the Harvey Canal.

3) That since April 1, 2001, the Boomtown Casino has been continuously moored in its boat slip located off the Harvey Canal.

4) That since April 1, 2001, the Boomtown Casino has been permanently moored to welded posts located in the boat slip cut into the Harvey Canal.

5) That since April 1, 2001, Boomtown cannot legally conduct gaming cruses [sic].

6) That Boomtown's Certificate of inspection by the United States Coast Guard requires it to remain in a continuously moored status.

7) That since April 1, 2001, Boomtown Casino has received its utilities including water, telephone lines, sewer lines, cable and data processing lines from land based sources which are permanently attached to the vessel.

8) That there is no plan to use the Boomtown Casino as anything other than an indefinitely permanently moored floating casino and that it is not and has not been a vessel in navigation since April 1, 2001.

/s/ Reynold Gaspard
Reynold Gaspard
Facilities Director
Boomtown Casino

SWORN TO AND SUBSCRIBED BEFORE ME, THIS 8th DAY OF DECEMBER, 2008.

/s/ A. Mark Flake
A. Mark Flake
Notary Public
La. Bar # 18244
My Commission Expires
Upon Death

U.S. Department of Homeland Security

[SEAL]

United States Coast Guard

Commander
United States Coast Guard
Sector New Orleans

201 Hammond Highway
New Orleans, LA 70005
Staff Symbol: s
Phone: (504) 846-6184
Fax: (504) 846-6196

16600
28 August 2009

Mr. Clifford D. Kortman
President, Pinnacle Design and Construction, LLC
Boomtown Casino
4132 Peters Road
Harvey, LA 70058

Dear Mr. Kortman:

I have received your appeal of my Captain of the Port Order 0899-09, to remove your vessel, M/V BOOM-TOWN BELLE II, from the Harvey Canal prior to the onset of storm winds from an impending hurricane. In response to your proposal, I am willing to grant approval of your appeal, subject to the following additional conditions:

1. In addition to all normal and emergency procedures you currently implement, the conditions proposed on page 15 of your appeal must be implemented.

2. All mooring wires, chains, or lines must be a minimum of one and one quarter inch in

diameter for wire rope, or have equivalent strength if chain or line and must be in good condition. Moorings must be capable of withstanding a 10.5 foot surge.

3. The standby towing vessel that you have described in Mr. Darden's letter of 31 August (attached) is acceptable. Your standby vessel must be radar and radio equipped. It must be immediately operational. The person in charge of the towboat must maintain a continuous radio guard on channels 67 and 16.

If you have questions or require further clarification, please contact me or LCDR William Daniels. I am at 504-846-6159. LCDR Daniels may be reached at 504-565-5044.

Sincerely,

/s/ E. M. Stanton
E. M. Stanton
Captain, U.S. Coast Guard
Captain of the Port,
New Orleans

Encl: Darden Letter of 31 Aug 09

U.S. Department
of Transportation

[SEAL]

United States
Coast Guard

Commanding Officer
U.S. Coast Guard
Marine Safety Office

1615 Poydras Street
New Orleans, LA
70112-1254
Phone: (504) 589-6273
Fax: (504) 589-4216

16711/BOOMTOWN
BELLE II
May 17, 2001

Westbank Riverboat Services, Inc.
Attn: Mr. Rolle J. Ducote Jr.
P. O. Box 740607
New Orleans, LA 70174

Subj: MANNING MODIFICATION REQUEST FOR M/V BOOMTOWN BELLE II, O.N. D1028319

Gentlemen:

This is in response to your letter dated April 16, 2001, requesting a manning reduction for the M/V BOOMTOWN BELLE II. Your request has been examined and found to provide an acceptable level of safety with the conditions noted below. In making this determination, I have given consideration to the characteristics of the vessel and its machinery plant, your stated intent to operate in a continuously moored status, and the proximity of city emergency services. The following comments apply:

1. Because the vessel will not be navigating on a waterway, your request to substitute licensed mate with a deckhand, trained as a member of the crew, is approved, provided this deckhand receives the training listed in your letter. The completion and documentation of annual refresher training by this deckhand is required to maintain this reduced level of manning.

2. Considering the limited operation of machinery onboard the vessel while moored (i.e. electrical power provided from shore), your request to remove the requirement for a licensed assistant engineer is approved only for routine operations while the vessel is moored. Likewise, you may use a non-certificated oiler to fill the oiler position in the engineering department.

3. Currently, your Certificate of Inspection (COI) requires eight deckhands and six security personnel. You also request permission to remove all deckhands while retaining the six security personnel. I recognize that the duties of the deckhands have been diminished by the removal of the vessel from navigation, but are nonetheless critical for the overall safety of the vessel and passengers. You may reduce the number of deckhands from eight to six. This is consistent with recent manning reductions for other continuously moored vessels of similar passenger load.

Appropriate entries will be made to the vessel's Certificate of Inspection to document these changes

and associated requirements. Should this vessel return to underway passenger service, you will be required to show compliance with all applicable regulations for operation on the specific route intended and comply with standard manning requirements.

If you have any questions on this matter, please contact Lieutenant Commander Cal Brown at (504) 589-4214.

Sincerely,

/s/ F. M. Paskewich
F. M. Paskewich
Commander, U.S. Coast Guard
Acting Officer in Charge
Marine Inspection